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No. 84-1451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BENNETT EDWARD BAKER,
Petitioner,

v.

SEABOARD SYSTEM RAILROAD, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a railroad employee was injured in an automobile accident which occurred while he was commuting to work from his home in his own automobile on a public highway, and, admittedly, it was up to him to choose the means and route by which he commuted, he was traveling on his own time and at his own expense, and he was not performing any work for the railroad—was the employee injured "while he (was) employed" by the railroad in "commerce", i.e., acting within the scope of his railroad employment, so that he could maintain an action against the railroad for the injury under the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq.?

Both the lower Courts (United States District Court for the Eastern District of Tennessee, Northern Division, and the United States Court of Appeals for the Sixth Circuit) have answered the question, "No".

Respondent* (the railroad) respectfully submits that the lower Courts were manifestly correct in so answering the question and that the petition for a writ of certiorari should be denied.

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* Respondent, Seaboard System Railroad, Inc., is a subsidiary of CSX Corporation.

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STATEMENT OF THE CASE

In this action, petitioner (Mr. Baker) sought to recover from the railroad under the provisions of the Federal Employers' Liability Act for injuries which he received on two different occasions. The first injury, a relatively minor back injury, occurred on October 20, 1980, while he was at work and was helping to lift a welding pot. The second injury, a very serious

one which left Mr. Baker a paraplegic, occurred on October 31, 1980, when he was in an automobile accident while commuting to work.

After taking Mr. Baker's discovery deposition, the railroad moved for the entry of a partial summary judgment in its favor, dismissing that portion of the action in which Mr. Baker sought to recover under the Act for the injury which occurred on October 31, 1980, when Mr. Baker had his automobile accident while commuting to work. The deposition and a brief were filed in support of the motion.

In opposition to the motion, Mr. Baker filed a brief, the depositions of Mrs. Baker and Mr. Reese, a railroad employee, and the affidavits of a Mr. Naeger and a Mr. Lyng.

In a well reasoned opinion, the District Judge, after citing numerous cases, held that under the undisputed facts Mr. Baker was not acting within the scope of his employment when he was injured in the automobile accident on October 31, 1980, while commuting to work, and that Mr. Baker was accordingly not entitled to maintain an action under the Act for that injury. An order sustaining the motion and dismissing the action insofar as it sought a recovery under the Act for the injury of October 31, 1980, was then entered. On Mr. Baker's motion, and without objection from the railroad, the District Judge then certified the order to be a final one under the provisions of Rule 54(b), FRCP, so that Mr. Baker might appeal the order. (The parties then stipulated a dismissal without prejudice of the remaining portion of the action which related to the injury which Mr. Baker received while he was at work on October 20, 1980.)

Mr. Baker appealed the order to the United States Court of Appeals for the Sixth Circuit, and that Court, after considering the briefs and hearing oral argument, issued an opinion which cited and followed the well-established law and affirmed the order.

ARGUMENT

A.

The Situation

The railroad submits that the situation is this: (1) The Federal Employers' Liability Act provides at 45 U.S.C. § 51 that an action may be maintained thereunder only if *two* things have happened. The first is that a railroad employee has sustained an injury while he was employed by the railroad in "commerce", i.e., while he was acting within the scope of his railroad employment. The second is that the injury which was so sustained within the scope of employment resulted in whole or in part from negligence of the railroad. (2) Here, by his own admissions under oath Mr. Baker established beyond any question that his automobile accident injury of October 31, 1980, was *not* sustained while he was employed by the railroad in "commerce", i.e., while he was acting within the scope of his railroad employment. (3) Nevertheless, and although he could have brought a common law action against the railroad if he chose to contend that the automobile accident injury was somehow caused by negligence on the part of the railroad rather than by his own negligence, he did not file such an action. (4) Instead, he sought to maintain an action under the Act for the automobile accident

injury primarily, if not solely, on the theory that it was somehow the fault of the railroad. (5) It would appear that Mr. Baker's principal argument in his petition (as it was in the two lower Courts which correctly rejected it) is that the motion for partial summary judgment should not have been granted, because there may have been some fact issues with respect to his contention that negligence on the part of the railroad, rather than his own negligence, may have caused his automobile accident injury. In short, Mr. Baker contends, in effect, as he did in the two lower Courts, that we should essentially ignore the requirement of the Act that for an injury to be actionable thereunder the injury must occur while the employee is acting within the scope of his railroad employment, and permit him to maintain an action under the Act for the injury, because, he says, the injury may somehow have resulted from negligence on the part of the railroad. Mr. Baker is simply continuing to burden the Courts with an ill-conceived attempt to maintain an action under the Act when his remedy was at common law.

B.

The Facts About Which There Is Admittedly No Genuine Issue

As is conceded at page 7 of the petition, with respect to his automobile accident of October 31, 1980, Mr. Baker made the following admissions in his discovery deposition which was taken on December 8, 1983:

1. He was driving his own automobile from his home en route to work.

2. He was driving on Alcoa Highway, which is a four-lane public highway.

3. The railroad didn't tell him how to get to work. It was his choice to drive his automobile rather than to take some other means of transportation, and it was his choice to take the route that he did.

4. On this occasion, as on all others when he was traveling to work, he was not paid for his time and he was traveling at his own expense.

5. He wasn't doing any work for the railroad when he was driving to work.

C.

The Law

The pertinent provision of the Federal Employers' Liability Act appears in the following emphasized portion of 45 U.S.C. § 51:

> "*Every common carrier by railroad while engaging in commerce* between any of the several States or Territories * * * *shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce* * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being

> employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Emphasis supplied)

As the elementary proposition was stated in *Metropolitan Coal Company* v. *Johnson,* 265 F.2d 173 (1st Cir. 1959),

> "(T)he obvious purpose of the Federal Employers' Liability Act is to enlarge the remedy of railroad employees injured as a result of hazards incident to their work." 265 F.2d at 178.

That a railroad employee who is commuting to work on his own time, at his own expense and by means of his own choice is not engaged in "commerce", i.e., acting within the scope of his railroad employment, and may not bring an action under the Federal Employers' Liability Act for an injury which he receives while he is so commuting, is so well established that the Court will not need citations. But, by way of illustration, the following cases may be noted: *Sassaman* v. *Pennsylvania R. Co.,* 144 F.2d 950 (3rd Cir. 1944). (Train dispatcher, injured while alighting from employer's passenger train on which he was returning home from work, could not maintain action under the Act.); *Quirk* v. *New York, C. & St. L. R. Co.,* 189 F.2d 97 (7th Cir. 1951, cert. denied 342 U.S. 871). (Track maintenance foreman, who at end of day's work traveled by private automobile to his headquarters and was injured while he was thereafter using railroad motorcar in continuing trip to his home, could not maintain action under the Act.); *Metropolitan Coal Co.* v. *Johnson,* 265 F.2d 173 (1st Cir. 1959). (Flagman, injured while riding on pass on railroad's passenger train to reach freight train on which he was

to begin work, could not maintain action under the Act.); *Getty* v. *Boston And Maine Corporation,* 505 F.2d 1226 (1st Cir. 1974). (Carman, injured in fall while walking toward train station platform to board passenger train to travel to his work place, could not maintain action under the Act.); *Kress* v. *Long Island R. R.,* 526 F. Supp. 856 (S.D. N.Y. 1981). (Freight clerk, assaulted in railroad's parking lot to which she had traveled 25 miles from place of work on railroad pass, could not maintain action under the Act.); and *Spoonamore* v. *Louisville and Nashville Railroad Company,* 179 F. Supp. 290 (E.D. Ky. 1959). (Locomotive engineer, injured when private automobile in which he was a passenger was involved in accident en route from his home to report for work on train, could not maintain action under the Act.)

The "commuting to work" cases on which Mr. Baker relies are inapposite. (Both were noted and distinguished from this case by the United States Court of Appeals for the Sixth Circuit in its opinion.) Thus, in *Parker* v. *Long Island Railroad,* 425 F.2d 1013 (2nd Cir. 1970), the employee after completing his work at a railroad tower walked to the railroad's passenger station where he was going to use a pass, which the railroad provided, to ride a train to his home 40 miles distant. He fell in the station due to poor lighting. Not only did the injury occur on railroad premises, but it appeared that the employee had no reasonable alternative but to use the pass in going home, and the employee was expected to use the pass in response to a railroad emergency. (Although *Parker* is clearly distinguishable from the case here, it appears to be a questionable holding, and there was a strong dissent by Judge Friendly.) And in *Getty* v. *Boston And*

Maine Corporation, 505 F.2d 1226 (1st Cir. 1974), which we have hereinbefore cited and shown to have held, along with numerous other cases, that a railroad employee who is commuting to or from work by means of his own choice is not acting within the scope of his railroad employment, the court by way of dictum made a statement on which Mr. Baker seeks to rely. The reliance is completely misplaced. The dictum was that "the situation may change if getting to work requires the employee to face unique hazards". (505 F.2d at 1228) The citation for the dictum was *Metropolitan Coal Co.* v. *Johnson,* 265 F.2d 173 (1st Cir. 1959), another case which we have hereinbefore cited and shown to have held, along with numerous other cases, that a railroad employee who is commuting to or from work by means of his own choice is not acting within the scope of his railroad employment. In *Metropolitan,* the court simply noted, as we have hereinbefore quoted from its opinion, that the obvious purpose of the Act is to enlarge the remedy of railroad employees who are injured as a result of hazards incident to their work, and the court held that for an employee to be exposed to any of those hazards he would have to be at work or on a part of the railroad's premises, or perhaps adjacent premises, which it was necessary for him to use to reach his work.

D.

Discussion

Mr. Baker states in his petition that the holdings of the lower Courts in this case "are in conflict with applicable decisions of this Court as well as other Courts of Appeal in construing the Statute". And yet

Mr. Baker does not cite any decision of this Court or any decision of any other Court in an effort to support that statement. The reason for his failure to do so is, of course, a very simple one—he can't, and the fact is that the holdings below are, as we have seen, fully in accord with well established law.

Mr. Baker seems to address a substantial portion, if not most, of his petition to his contention that his automobile accident injury may have been caused by negligence on the part of the railroad rather than by his own negligence. The same situation existed in each of the commuting to work cases which we have cited, i.e., even though it was alleged that the injury was caused by railroad negligence, an action therefor could not be maintained under the Act, because the injury was not sustained while the employee was acting within the scope of his railroad employment. In short, in each of those cases, as here, the action lacked one of the two essential requirements under the Act.

It is interesting to note that in each of the Federal Employers' Liability Act cases which Mr. Baker cites on the subject of railroad negligence, including foreseeability and legal consequence, the injury of which complaint was made occurred while the employee was acting within the scope of his railroad employment. Thus, in *O'Donnell* v. *Pennsylvania R. Co.*, 122 F. Supp. 899 (S.D. N.Y. 1954), the employee, an engineman, got a foreign body in his eye while he was at work. A railroad doctor treated the eye, and as a result the eye injury allegedly worsened. And in *Dunn* v. *Conemaugh & Black Lick Railroad*, 267 F.2d 571 (3rd Cir. 1959) (162 F. Supp. 324 below; cited by Mr. Baker as 163 F. Supp. 324), the employee had surgery

for chronic ulcers and was certified for return to work by a railroad doctor. Thereafter, and while he was engaged in heavy work, he suffered a large ventral hernia, for which he sued. And in *Panichella* v. *Pennsylvania Railroad Company (*v. *Warner Brothers Pictures, Inc.),* 167 F. Supp. 345 (W.D. Pa. 1958), the employee was at work and was being paid for his time when at the direction of his foreman he went upon a snow covered sidewalk adjacent to the premises of a third party and slipped and fell. And, finally, in *Waller* v. *Southern Pacific Company,* 57 Cal. Rptr. 353, 424 P.2d 937 (Sup. Ct. Cal. 1967), the employee, a train dispatcher with a history of coronary artery disease, was certified by railroad doctors as being fit for work after a hospitalization, and upon returning to work and as a consequence of the stress of his job he suffered an aggravation of his heart condition for which he sued.

A final word. Mr. Baker suggests in his petition that his reporting for work was of benefit to the railroad because of a "safety contest". Although his so reporting was undoubtedly of as much benefit to him as it was to the railroad, he then suggests something which seemingly demonstrates a realization on his part that the lower Courts were entirely correct in their holdings. And the suggestion is a startling one and obviously incorrect. The suggestion seems to be that if it was of benefit to the railroad for him to report for work it was also of benefit to the railroad for him to commute to work, and because of that "benefit" he should be permitted to maintain an action under the Act for his automobile accident injury! (A far reaching suggestion, because it is of benefit to the railroad for each of its employees to report for work. As the

saying goes, you can't run a railroad without people.) Mr. Baker's suggestion is, of course, contrary to the clear language of the Act (45 U.S.C. § 51) and all established law. As was stated in *Quirk* v. *New York, C. & St. L. R. Co.,* 189 F.2d 97 (7th Cir. 1951, cert. denied 342 U.S. 871), a commuting to work case which we have cited earlier:

> "We are not unmindful of the liberal interpretation which the courts have placed, and properly so, upon the Federal Employers' Liability Act, designed for the benefit and protection of railroad employees but, even so, there is a point beyond which its application must be denied. Plaintiff's position in the instant case, if accepted, would come close to stripping it of any limitation." 189 F.2d at 101.

CONCLUSION

The petition for a writ of certiorari is patently without merit and should be denied.

Respectfully submitted,

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